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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EASTMAN KODAK COMPANY,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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March 14, 1989

Question Presented

Section 455(b) of the Judicial Code requires federal judges to disqualify themselves in specified circumstances that may affect their impartiality, and Section 455(e) provides that such disqualification cannot be waived. In the present case, a federal district judge, after disclosing the existence of a family financial interest requiring disqualification under Section 455(b), erroneously declined to step down and then proceeded to conduct a nonjury trial and to enter interlocutory orders of crucial importance. The question presented is whether, on motion made prior to final judgment, those orders must be vacated.

Rule 28.1 Statement

The subsidiaries and affiliates of petitioner Eastman Kodak Company, other than wholly owned subsidiaries, are listed below:

City Photo Limited
Consumer Developments Ltd.
Dainichiseika-Sterling Co. Ltd.
Inrock Chemical Co., Ltd.
K.K. Big Color Service
K.K. Eiko Photo
K.K. Nihonbashi Pro Color
K.K. Tokyo Color Chiba Lab.
K.K. Tokyo Color Shizuoka Lab.
K.K. Yokohama Lab.
Kasei Verbatim Kabushiki Kaisha
Kodak Japan Ltd. (formerly Kodak Nagase K.K.)
Kodak Nagase Medical K.K.
Mackwoods-Winthrop Ltd.
Miller Bros. Hall & Company Limited
P.T. Sterling Products Indonesia
Photo Finishers (Glasgow) Limited
Quick Processing Industries (UK) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Sterling Drug Korea Ltd.
Sterling Drug (Malaya) Sdn. Bhd.
Sterling Farmaceutica Portuguesa Lda.
Sterling Products (Ghana) Ltd.
Sterling Products (Nigeria) Ltd.
Sterling Products Pakistan (Private) Ltd.
Sterling Yamanouchi Pharmaceutical Inc.
Stuart Photo Services Limited
Taylors Developing & Printing Works Limited
Verbatim Comercial Ltda.

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No.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Eastman Kodak Company ("Kodak") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered February 17, 1989.

Opinions Below

The opinion of the court of appeals [A1-14] is not yet reported. The district court's oral statement of October 5, 1981 [B1-2], its memorandum of June 21, 1988 [C1-2] and its order and oral opinion of August 11, 1988 [D1-8] are unreported.

The district court's opinion with respect to certain liability issues is reported at 641 F. Supp. 828 (D. Mass. 1985), and the court of appeals' opinion affirming as to those issues is reported at 789 F.2d 1556 (Fed. Cir. 1986).

Jurisdiction

The judgment of the court of appeals [E1] was dated and entered February 17, 1989. No rehearing was sought. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statute Involved

Section 455 of the Judicial Code (28 U.S.C. § 455) provides in pertinent part as follows:

> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> "(b) He shall also disqualify himself in the following circumstances:
>
> * * *
>
> "(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> * * *
>
> "(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . . .
>
> * * *
>
> "(d) For the purposes of this section the following words or phrases shall have the meaning indicated:
>
> * * *
>
> "(2) the degree of relationship is calculated according to the civil law system . . . .
>
> * * *

> "(e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

Section 455 in its entirety is set forth in the appendix to this petition [F1-3].

Statement of the Case

Respondent Polaroid Corporation ("Polaroid") commenced this action in April 1976 alleging that Kodak had infringed certain Polaroid patents relating to instant photography and demanding unspecified damages, an injunction and other relief.[1] Kodak denied infringement and counterclaimed for declaratory relief with respect to these and various related Polaroid patents.

It was obvious from the outset that this was a high-stakes lawsuit. If Polaroid were to prevail, Kodak could well be forced out of the instant-photography business altogether, as ultimately it was. Discontinuing that business under the gun of an injunction would not only deprive Kodak of all future profits from that business but require it to recall products and to write off plant and equipment at a cost of hundreds of millions of dollars. Kodak thus stood to suffer serious financial losses quite apart from any damages that it might be required to pay Polaroid. In papers filed in December 1987, Polaroid claimed damages of some $12 billion—more than Kodak's net worth.

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[1] Polaroid brought this action in the United States District Court for the District of Massachusetts, where its principal place of business is located, invoking that court's jurisdiction under 28 U.S.C. § 1338(a).

On October 5, 1981, trial began before District Judge Rya W. Zobel, sitting without a jury, with respect to the validity, enforceability and infringement of certain of the disputed patents. All other issues, including the validity and infringement of other disputed patents, damages and other forms of relief, were reserved for later determination.

Moments before trial began, Judge Zobel made the following announcement from the bench:

> "Before we begin, I should tell you that I have a mother-in-law problem. It is not the sort that Ann Landers would be interested in. But I learned yesterday that my mother-in-law owns a thousand shares of Kodak stock. She has been a stockholder of Kodak for some 50 years. I do not find this as disqualifying and at this point will proceed to hear the case" [B2].[2]

Without saying anything further on the subject, and without inviting comment by counsel, Judge Zobel directed that the trial commence [B2].

On October 11, 1985, Judge Zobel entered an interlocutory order setting forth her conclusion that several Polaroid patents were valid and infringed and enjoining Kodak from further infringement. The order expressly reserved all issues of damages, willfulness, costs and attorneys' fees for later determination.[3] On Kodak's appeal

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[2] It is undisputed that Judge Zobel's mother-in-law was "a person within the third degree of relationship" to Judge Zobel's husband within the meaning of 28 U.S.C. § 455(b)(5). Polaroid's claims for damages, which it later quantified at some $12 billion, translate into approximately $74,000 for the 1,000 shares of Kodak stock held by Judge Zobel's mother-in-law on October 4, 1981, the day Judge Zobel became aware of that interest. Those shares then had a market value of about $66,500.

[3] Although styled a "judgment" pursuant to F. R. Civ. P. 54(b), Judge Zobel's order of October 11, 1985 was addressed solely to

(footnote continued on following page)

pursuant to 28 U.S.C. § 1292(c), the court of appeals affirmed on the ground that Judge Zobel's "controlling fact findings" were not "clearly erroneous" and that she did not commit "reversible error." 789 F.2d 1556, 1558-59 (Fed. Cir. 1986). This Court denied certiorari. 479 U.S. 850 (1986). As a direct result of Judge Zobel's injunction, Kodak forthwith abandoned the instant-photography business.

On May 9, 1988, during a conference in chambers with respect to the remaining issues in the case, Judge Zobel informed counsel that her mother-in-law had recently died leaving an estate containing Kodak stock, that her husband was named an executor of the estate and was a residuary beneficiary, and that she herself had received a specific bequest. Kodak's stock ownership records establish that Judge Zobel's mother-in-law was, at the time of her death, the owner of 2,250 shares of Kodak stock having a market value of approximately $100,000. Judge Zobel scheduled a further conference for July 6, 1988 to discuss whether under these circumstances her disqualification from further participation in the case was required or might be waived or cured.[4]

On June 15, 1988, Kodak moved to disqualify Judge Zobel from further participation in the case pursuant to

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(footnote continued from preceding page)

the "issues decided"; it did not fully adjudicate any claim for relief—it expressly left open all issues relating to damages, for example. The order was therefore not a final judgment as a matter of law. *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 7-10 (1980); *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 742-44 (1976).

[4] In 1986, following the court of appeals' affirmance of Judge Zobel's 1985 injunction, Kodak had retained new lead counsel who, until May 9, 1988, were unaware that Judge Zobel's mother-in-law had been a Kodak stockholder. Neither Judge Zobel nor counsel for either party had referred to that ownership at any time between October 5, 1981, when Judge Zobel ruled that it was "not . . . disqualifying," and the May 9, 1988 conference.

28 U.S.C. § 455 and also to vacate all orders that she had entered after October 4, 1981, the date on which she learned that her mother-in-law owned Kodak stock [D1]. On June 21, 1988, without vacating those orders, Judge Zobel recused herself [C1-2], and the case was reassigned to Judge A. David Mazzone.

On August 11, 1988, Judge Mazzone refused to vacate any of Judge Zobel's orders [D1], citing three reasons. First, although recognizing that Judge Zobel "was able to determine the case in such a way that [Kodak] stockholders would have been affected" [D6], Judge Mazzone could not say that Judge Zobel was incorrect in refusing to disqualify herself in October 1981 because of "the uncertainty of the outcome" of the action and because the 1,000 shares of Kodak stock owned by Judge Zobel's mother-in-law were "insubstantial and insignificant in amount" [D7]. Second, he regarded F. R. Civ. P. 60(b) as applicable [D7] notwithstanding the absence of a final judgment. And third, he believed that reconsideration of Judge Zobel's orders would not be "fair" or "equitable" [D7].

On Kodak's interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and (c)(1), the court of appeals affirmed solely on the third of these grounds, expressly stating that it neither agreed nor disagreed with the first two grounds [A6 n.7] and that for present purposes it was "assuming" that Judge Zobel should have disqualified herself in 1981 [A11]. Saying that the issue was whether Judge Mazzone had "abused [his] discretion" [A5], the court said that "whether Judge Zobel should have disqualified herself in 1981 is irrelevant" [A7] and that the question for consideration "is one of fundamental fairness" [A8]. "The test to be applied" [A11], the court concluded, is that provided

in *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988).

With virtually no discussion, the court brushed aside the fact that *Liljeberg* involved a final judgment that could be vacated only under Rule 60(b), whereas the present case has not yet proceeded to final judgment; the court merely said that the difference between a final and a nonfinal judgment is a "label" [A13]. The court also deemed it irrelevant that *Liljeberg* involved a Section 455(a) disqualification, which the parties can waive, whereas the present case involves a Section 455(b) disqualification, which is expressly *not* waivable [A12]. *See* 28 U.S.C. § 455(e). Incorrectly stating that *Liljeberg* "made no such distinction" [A12], *see* 108 S. Ct. at 202 n.8, the court below refused to vacate Judge Zobel's orders because Kodak "remained silent" [A10] and displayed "acquiescence" [A11] after she had ruled that she was not disqualified, thus holding that Kodak had in effect waived what Section 455(e) makes nonwaivable.

Reasons for Granting the Writ

The court below has decided an important question relating to the impartiality of federal judges and the administration of justice. In refusing to set aside or reconsider nonfinal orders entered by a judge who had erroneously declined disqualification under the absolute, nonwaivable mandate of 28 U.S.C. § 455(b), the court below has thwarted the statute's salutary purpose, has departed from principles established by this Court and has unjustifiably extended this Court's decision in *Liljeberg* to a case in which there is not yet a final judgment and in which waiver is expressly precluded by statute. The issue raised by that decision merits review by this Court.

I.

In declining to purge interlocutory orders tainted by Judge Zobel's Section 455(b) violation, the court below relied entirely on what it called "equity/fairness considerations" [A9]. The principal statutory goal, however, is not "equity" or "fairness," but "confidence in the impartiality of federal judges." H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 7 (1974).[5] By allowing Judge Zobel's Section 455(b) violation to stand uncorrected, the court below has frustrated that purpose and rendered the statute precatory and toothless.

Worse still, by asserting that the existence of a Section 455(b) violation is somehow "irrelevant" to the validity of orders entered by a judge during—and possibly as a consequence of—that violation, the court below sent an inappropriate message to the federal judiciary: Section 455(b) can be safely disregarded unless one of the parties presses a specific objection. The statute, however, places the responsibility for compliance solely on the judge. *United States* v. *Wolfson,* 558 F.2d 59, 62 n.11 (2d Cir. 1977) ("Section 455 is a self-enforcing provision that is directed towards the judge"). As soon as one of the circumstances enumerated in Section 455(b) comes to his attention, a federal judge is required to step down *sua sponte.* The parties have neither the duty to move for disqualification nor the power to waive it. By focusing on *Kodak* rather than Judge Zobel, the court below improperly re-

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[5] Senator Burdick, Chairman of the Subcommittee on Improvements in Judicial Machinery and sponsor of the 1974 amendments to Section 455, explained that disqualification under Section 455(b)(4) and (5) for "financial interest or kinship within the third degree" had been made expressly nonwaivable because "these are two instances in which the public at large would feel a judge most certainly should disqualify himself." 119 Cong. Rec. 33,030 (1973).

lieved the judge of compliance responsibility and shifted it to the parties.[6]

II.

The court below attached decisive significance to the fact that, after Judge Zobel had revealed her disqualifying interest but declined to step down, Kodak "remained silent," raised no "objection," failed to seek "mandamus" and indicated "acquiescence" [A10-11]. The court held, in effect, that by silence and acquiescence Kodak had waived its right to object to Judge Zobel's violation of Section 455(b). Section 455(e), however, expressly provides that a Section 455(b) violation cannot be waived. It can hardly be supposed that Section 455(e) prohibits waiver by affirmative consent yet allows waiver by silence or "acquiescence."

Congress had good reason for making Section 455(b) disqualification nonwaivable. Litigants are understandably reluctant to suggest the presence of a disqualifying interest on the part of the federal judge presiding over their case, and counsel may fear giving offense to a judge before whom they regularly appear. There is no blinking the reality that a federal judge, having total confidence in his own incorruptibility, may unwittingly coerce a waiver with "a velvet blackjack."[7] By making Section 455(b) disqua-

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[6] Although the court below properly recognized that Section 455 "deals only with action of a judge" and "has nothing to do with actions of counsel" [A6], its decision was based wholly on the latter and ignored the former.

[7] "The Congress accepted the view that waiver 'has a way of becoming a velvet blackjack' and should not be allowed." 13A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3552, at 649 (2d ed. 1984) (quoting Frank, *Commentary on Disqualification of Judges—Canon 3C*, 1972 Utah L. Rev. 377, 387).

lification nonwaivable, Congress has sought to avert such a possibility. The decision below, by permitting a federal judge's Section 455(b) violation to be rendered nugatory by a party's inaction, has effectively undermined the congressional purpose in declaring a disqualifying interest under Section 455(b) to be nonwaivable.[8]

III.

The decision below conflicts with the established principle that any nonfinal decree rendered by an improperly constituted court must be vacated regardless of the inevitable "unfairness" to the prevailing party. In *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913), for example, this Court vacated a decree of the circuit court of appeals on the sole ground that, in violation of statute (the predecessor of 28 U.S.C. § 47), one of the judges sitting on that court was the district judge who had heard the case in the first instance. The fact that the parties had expressly consented to that judge's participation was held irrelevant because "the comprehensive and inflexible character of the prohibition was intended to prevent resort to consent of the party or parties as a means of qualifying a judge to participate in the decision . . . ." 228 U.S. at 650. Without

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[8] This would be an inappropriate case for a waiver theory in any event, for Judge Zobel announced her mother-in-law's stock interest and declined to disqualify herself in a single breath. Thus Kodak "remained silent" only after Judge Zobel had already made her ruling. Under these circumstances, the court of appeals' novel suggestion that Kodak was somehow obligated to voice an instantaneous "objection" and then to seek the extraordinary remedy of mandamus if Judge Zobel refused to change her ruling [A10] has no basis in law or reason. Nor did the court have any factual basis for saying that such action "would have avoided any problem" [A10]; that assertion was sheer speculation.

alluding to "fairness," this Court vacated the decree on the ground that the court that had rendered it "was virtually no court at all, because not organized in conformity to law." *Id.* at 652.[9]

In cases under the due process clause of the fourteenth amendment, this Court has repeatedly vacated judgments rendered by state courts whose members had a disqualifying personal interest in the outcome or otherwise lacked impartiality.[10] In none of these cases did this Court allude to possible "unfairness" to the party prevailing below or suggest that any remedy short of vacating the judgment was available or appropriate.

The lower courts have routinely vacated orders and nonfinal judgments rendered by judges or judicial officers found to be disqualified by statute notwithstanding any "unfairness" to the prevailing party.[11] Vacating an order

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[9] *See also Berger* v. *United States,* 255 U.S. 22, 36 (1921) (upon filing of affidavit of prejudice, "Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment").

[10] *E.g., Aetna Life Ins. Co.* v. *Lavoie,* 475 U.S. 813 (1986); *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972); *In re Murchison,* 349 U.S. 133 (1955); *Tumey* v. *Ohio,* 273 U.S. 510 (1927).

[11] *E.g., Moody* v. *Simmons,* 858 F.2d 137, 143 (3d Cir. 1988) (orders vacated because "a judge who was obliged to recuse acts outside his jurisdiction"); *United States* v. *Gipson,* 835 F.2d 1323, 1325 (10th Cir.), *cert. denied,* 108 S. Ct. 2038 (1988) (28 U.S.C. § 455(b), being nonwaivable, "creates what is tantamount to a 'jurisdictional' limitation on the authority of a judge to participate in a given case"); *Davis* v. *Xerox,* 811 F.2d 1293, 1296 (9th Cir.), *cert. denied,* 108 S. Ct. 457 (1987) (*dictum*) (where "a judge has sat whom Congress had disqualified from sitting, the disqualified judge's rulings are, on appeal, to be vacated"); *Mixon* v. *United States,* 620 F.2d 486 (5th Cir. 1980) (judgment vacated because magistrate was disqualified under 28 U.S.C. § 455(b)(3) and the proceedings were therefore a "nullity"); *NEC Corp.* v. *United States*

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almost always involves some delay, duplication of effort and "unfairness" to at least one of the parties. Such considerations must yield, however, to the overriding requirement that the exercise of judicial office be restricted to those having statutory power to act. *See Christianson* v. *Colt Industries Operating Corp.*, 108 S. Ct. 2166, 2178 (1988) ("Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction"). Nor does a party have any vested right in interlocutory decisions in its favor, no matter how extended the litigation may have been. *See Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) (after eight years of litigation, including two appeals to the court of appeals, this Court dismissed case on ground that plaintiff lacked "standing").

IV.

There can be no suggestion that Judge Zobel's Section 455(b) violation was harmless error, nor did the court below treat it as such. *Cf. Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1527-28 (11th Cir. 1988). As Judge Mazzone later acknowledged, Judge Zobel "was in a position to determine the case in favor of either [party]" [D6]. She was the trier of fact, and her decision would be subject

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(footnote continued from preceding page)

District Court, 835 F.2d 1546 (9th Cir. 1988) (district judge recused himself and vacated his prior orders); *In re Jafree*, 741 F.2d 133, 137 (7th Cir. 1984) (order of district court executive committee vacated because three of the judges were disqualified under 28 U.S.C. § 455(b)(1)); *In re Washington Public Power Supply System Securities Litigation*, 623 F. Supp. 1466, 1470 (W.D. Wash. 1985), *affirmed*, 823 F.2d 1349 (9th Cir. 1987) (all substantive rulings of disqualified district judge vacated by successor judge). *See also* Wright, Miller & Cooper, *supra*, § 3553, at 656-57.

to only limited appellate review. *See* 789 F.2d at 1558-59 (Judge Zobel's "controlling fact findings" were not "clearly erroneous" and she did not commit "reversible error"). The issues before her were of crucial importance. If she were to decide in Polaroid's favor, Kodak could be forced to make a precipitous exit from the instant-photography business, could incur costs of hundreds of millions of dollars in consumer refunds and asset write-offs, and could be exposed to damages that Polaroid now claims are in the billions. Without a doubt, such a decision could substantially affect the value of Kodak's shares. Judge Zobel made such a decision at a time when she had full knowledge that a member of her immediate family was a Kodak stockholder. Whether she was in fact influenced by that knowledge, unconsciously or otherwise, is an imponderable. But it can hardly be doubted that from the moment she acquired that knowledge, there was *danger* of such influence.[12]

Section 455(b) reflects Congress' concern not only that a judge might be tempted to favor personal or family financial interests, but that awareness of such interests might cause even the most conscientious judge to "lean over backwards to demonstrate [impartiality], which is not also doing justice."[13] Federal judges are regularly called on

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[12] A major problem with the "equity/fairness" test devised by the court below is that whether or not a judge has in fact been influenced by a disqualifying interest is inherently unknowable. Balancing the equities, therefore, will nearly always favor the prevailing party because *actual* influence can rarely be demonstrated—a result inimical to the prophylactic effect Congress intended when it mandated disqualification in specified circumstances capable of objective determination.

[13] *To Broaden and Clarify the Grounds for Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 19 (1974) (remarks of Rep. Cohen).

to assess conflicting and ambiguous evidence, to determine credibility, to apply elusive legal principles and to exercise a vast armory of discretionary powers. If such powers are exercised by a judge with a specific disqualifying interest, no one—probably not even the judge himself—can say for sure that this interest had no influence on his decisions. It was the judgment of Congress that decisions subject to such doubts should not be made at all, even with the parties' consent. Allowing such tainted decisions to stand while they still lack finality invites troublesome questions about the integrity of the federal judiciary.

V.

The court of appeals' reliance on *Liljeberg* v. *Health Services Acquisition Corp., supra,* was erroneous for two fundamental reasons.

First, *Liljeberg* involved a motion under F. R. Civ. P. 60(b) to vacate a judgment that had already become final and that could therefore be reopened only under "extraordinary circumstances." 108 S. Ct. at 2204 (citing *Ackermann* v. *United States,* 340 U.S. 193 (1950)). This Court resolved the clash between a statute mandating recusal and the policy of giving finality to judgments by weighing factors pertinent to relief under Rule 60(b). 108 S. Ct. at 2204. There is no need to weigh such factors in the present case because the orders in question can be vacated without "the reopening of closed litigation." *Id.* at 2203. By viewing the distinction between an interlocutory order and a final judgment as a mere "label" [A13], the court below departed from a basic principle of federal jurisprudence and thereby extended *Liljeberg* far beyond its proper scope.

Second, *Liljeberg* involved a Section 455(a) rather than a Section 455(b) disqualification. As this Court pointed out, there are "important differences" between the two subsections, Section 455(b) being "a somewhat stricter provision" and disqualification being waivable under Section 455(a) but nonwaivable under Section 455(b). 108 S. Ct. at 2202 n.8. The considerations that *Liljeberg* held applicable in a Section 455(a) case are incompatible with Section 455(b)'s "stricter," nonwaivable mandate, which "creates what is tantamount to a 'jurisdictional' limitation on the authority of a judge to participate in a given case." *United States* v. *Gipson*, 835 F.2d 1323, 1325 (10th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988). *See William Cramp & Sons, supra*, 228 U.S. at 652 (participation of judge subject to nonwaivable disqualification renders court "virtually no court at all, because not organized in conformity to law").

Far from supporting the decision below, *Liljeberg* exposes its error. The considerations that this Court found sufficient even to warrant the reopening of a final judgment in a Section 455(a) case—"the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process," 108 S. Ct. at 2204—*a fortiori* compel vacatur of nonfinal orders entered by a judge having a specific disqualifying interest under Section 455(b).

Vacating Judge Zobel's orders for reconsideration by a disinterested judge might cause inconvenience but surely not "injustice": Polaroid has no vested right to interlocutory decisions in its favor; both parties have a right to have this case decided by a judge who is not disqualified by statute; and Polaroid, no less than Kodak, is chargeable

with silence and acquiescence in the face of Judge Zobel's Section 455(b) violation. By upholding nonfinal decisions made by a judge disqualified under the financial-interest provisions of Section 455(b) and by shifting compliance responsibility from the judge to the parties, the court below has brought the "velvet blackjack" back into the courtroom in contravention of clear congressional intent and thereby created the risk of serious injustice in other cases. And most importantly, by upholding decisions infected by a disqualifying financial interest, the court below has engendered a serious "risk of undermining the public's confidence in the judicial process."

CONCLUSION

For the foregoing reasons, a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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Of Counsel

March 14, 1989

APPENDIX A

Opinion of the Court of Appeals, February 17, 1989

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

No. 88-1616

POLAROID CORPORATION,

Plaintiff-Respondent,

v.

EASTMAN KODAK COMPANY,

Defendant-Petitioner.

DECIDED: February 17, 1989

Before MARKEY, *Chief Judge,* NEWMAN and MAYER, *Circuit Judges.*

MARKEY, *Chief Judge.*

Appeal from an order of the United States District Court for the District of Massachusetts (Mazzone, J.), No. 76-1634, denying Eastman Kodak Company's (Kodak) motion to "vacate all orders entered by Judge Zobel in this action from October 4, 1981 to date." [1] We affirm.

BACKGROUND

On 26 April 1976, Polaroid Corporation (Polaroid) sued Kodak for infringement of ten Polaroid patents relat-

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[1] At Kodak's request, the district court certified its order for immediate appeal. *See* 28 U.S.C. §§ 1292(c)(1), 1292(b). By order dated 12 September 1988, this court granted Kodak's petition for permission to appeal.

ing to its integral instant camera and film system.[2] On 6 October 1981, after extensive pleading, counterpleading, and discovery, trial commenced on liability issues relating to those ten patents. At the very outset, Judge Zobel announced:

> Before we begin, I should tell you that I have a mother-in-law problem. It is not the sort that Ann Landers would be interested in. But I learned yesterday that my mother-in-law owns a thousand shares of Kodak stock. She has been a stockholder of Kodak for some 50 years. I do not find this as disqualifying and at this point will proceed to hear the case.

On 11 October 1985, the court issued what it called a final judgment on the claims tried. Both parties sought and received certification under Fed. R. Civ. P. 54(b) that there was no "just reason for delay with respect to the entry of a judgment on these ten patents." In its appeal from that judgment, Kodak listed six errors and proferred eighteen arguments in an attempt to show that the court's findings and conclusions were "fatally flawed by systemic legal errors." 789 F.2d at 1559.

After this court affirmed the judgment and the Supreme Court denied certiorari, the case returned to the district court for assessment of damages on the claims decided and for trial on the remaining claims. Judge Zobel presided over another two years of discovery on damages and conducted ten pretrial conferences.

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[2] A full explanation of those patents can be found in the district court's memorandum decision on the liability issues. 228 USPQ 305 (D. Mass. 1985), *aff'd*, 789 F.2d 1556, 229 USPQ 561 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 850.

On 9 May 1988, Judge Zobel held another pretrial conference. At that time she informed counsel that her mother-in-law had died, that she could not continue to preside over the case, and that she was *sua sponte* disqualifying herself because she was a legatee and her husband was executor of the estate.

Counsel for both sides expressed a desire to waive any objection to her participation. Judge Zobel nonetheless stated that disqualification was mandatory and unwaivable. At the request of counsel, however, she agreed to delay her formal disqualification while counsel conducted research for support of their desire that she participate. She took no action in the case after 9 May 1988.

Kodak reversed its earlier position that it could waive her disqualification. Instead of merely informing Judge Zobel of that change and allowing her announced disqualification to be formalized, Kodak filed on 15 June 1988 an unnecessary motion requesting her disqualification.[3] Thus for the *first* time, six and one-half years after Judge Zobel disclosed on the record her mother-in-law's interest and stated her determination that it was not disqualifying, Kodak saw what it hoped would be a basis for her disqualification. Seizing on that basis, Kodak moved at the same time that Judge Zobel vacate all orders she had entered after 4 October 1981, arguing that her participation after that date contravened 28 U.S.C. § 455(b)(5)(iii) and that her disqualification could not be waived. *See* 28 U.S.C. § 455(e).

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[3] Exemplifying the adage that "no good deed ever goes unpunished," Kodak's brief leads the reader uninformed of the record to believe Judge Zobel disqualified herself only in response to Kodak's motion.

Court of Appeals Opinion

On 21 June 1988, Judge Zobel disqualified herself *nunc pro tunc* effective 9 May 1988. She did not rule on either of Kodak's motions. The case was reassigned to Judge Mazzone.

On 11 August 1988, Judge Mazzone heard argument on Kodak's motion to vacate the orders and denied the motion.[4] Judge Mazzone stated in his opinion from the bench:

> While [Judge Zobel] was in a position to determine the case in favor of either [party], or [though] she was able to determine the case in such a way that . . . stockholders in either company would have been affected, she said she did not believe that to be so. . . . Perhaps it was the amount of stock which is insubstantial and insignificant in amount in comparison to the outstanding stock,[5] or [perhaps it was] the uncertainty of the outcome. . . .
>
> . . . [S]he said she did not believe [her mother-in-law's stock in Kodak was] a disqualifying reason. And I don't think that she was incorrect.

Judge Mazzone also said that "[a] modest amount of Eastman Kodak's revenues are involved, I'm informed in the Schwartz affidavit, and I have nothing to controvert that." The Schwartz affidavit indicated that "instant photography accounted for 1.3 to 5.1% of Kodak's total sales in the years 1976 to 1985."

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[4] Appropriately, Judge Mazzone "marveled" at the work Judge Zobel did in the liability phase of the case. This court's earlier opinion expressed a similar sentiment. 789 F.2d at 1557, 229 USPQ at 562.

[5] The record does not reveal the total number of outstanding shares of Kodak stock in 1981. At oral argument, however, counsel for Kodak estimated the number at 162.5 million.

Further, Judge Mazzone noted that: (1) Kodak had been aware of the mother-in-law's interest for six and one-half years, through trial, appeal, and subsequent proceeding, and had never suggested that her participation violated section 455 (indicating that "Kodak had agreed" with Judge Zobel's conclusion); (2) "[w]itnesses have aged [and] memories have faded;" (3) liability was "tried long ago in a long complex exhausting effort by all parties" and the judgment on liability was appealed from and affirmed; and (4) "years and years have gone by." In light of those factors, and citing the Supreme Court's recent guidance in *Liljeberg* v. *Health Services Acquisition Corporation*, 108 S. Ct. 2194, 2203-2204 (1988), Judge Mazzone concluded that:

> [U]nder these circumstances, I cannot find that it is the law that Eastman Kodak obtains a vacation of this case up to this point. I do not think that would be fair, nor do I think it would be equitable to everyone. It simply gives Eastman Kodak another trial and that would not be, in my judgment, the sensible and fair outcome of this case.

Finally, Judge Mazzone stated that "I believe Rule 60(b) applies, and Eastman Kodak is barred from obtaining a vacation of these orders. . . ."

ISSUE

Whether the district court abused its discretion in denying Kodak's motion to vacate Judge Zobel's orders.[6]

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[6] Focusing on Judge Zobel's 1981 determination that disqualification was not required, Kodak argues that the question is one of statutory interpretation and that the statute provides for no discretion in making that determination. As set forth in text, the appeal is from Judge Mazzone's denial of Kodak's motion to vacate, not from Judge Zobel's determination of non-disqualification.

OPINION

Kodak's appeal is from Judge Mazzone's denial of its motion to vacate Judge Zobel's previous orders. That denial rested on three grounds: (1) Judge Zobel correctly determined that her mother-in-law's interest was not disqualifying; (2) the motion is barred because Judge Zobel's orders were "final" and not within Rule 60(b); and (3) to vacate Judge Zobel's orders now would be inequitable and unfair. Because we find the last fully adequate to reflect the absence of abuse of discretion by Judge Mazzone, we need not, and for that reason alone do not, address grounds (1) and (2).[7]

Vigorously and strenuously, Polaroid argues for and Kodak argues against a "timeliness requirement" applicable to 28 U.S.C. section 455(b). Both arguments are analytically flawed. Application of a "timeliness" requirement requires a fixed point or bench mark from which the timeliness or untimeliness of an action can be measured (*e.g.* 10 days after event *X*; before event *Y*). There is no such provision anywhere in section 455. Nor could there be. The statute deals only with action of a judge. It has nothing to do with actions of counsel. Actions to disqualify a judge are provided for in 28 U.S.C. § 144,[8] which does contain the

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[7] That we do not unduly lengthen this opinion with an unnecessary discussion of grounds (1) and (2) cannot, of course, be viewed as indicating either disagreement or agreement therewith. We note, however, that our decision here, where Judge Zobel made her § 455 determination on the record before trial, cannot encourage judges to treat lightly the thrust of § 455.

[8] 28 U.S.C. § 144 reads:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge

(footnote continued on following page)

required bench mark (10 days before the beginning of term or good cause if later).

Kodak argues the present appeal as though it had been filed in 1981 to challenge Judge Zobel's determination of non-disqualification. Kodak did not seek to disqualify Judge Zobel under § 144.[9] But whether Judge Zobel should have disqualified herself in 1981 is irrelevant. Judge Zobel is now disqualified, Judge Mazzone is presiding, and, as above indicated, the present appeal is solely from Judge Mazzone's denial of Kodak's motion to vacate all of Judge Zobel's orders issued since 1981. Though Judge Mazzone referred to the passage of six and one-half years, he did not simply dismiss Kodak's motion as "untimely." On the

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(footnote continued from preceding page)

> before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

[9] Section 144 deals with an affidavit to disqualify a judge for bias or prejudice. There is no evidence, nor does Kodak suggest, nor could it, that Judge Zobel was biased or prejudiced, or for any reason failed to conduct a fair trial. Because 455(b) may be viewed as presuming bias or prejudice when any of its listed circumstances are present, it is arguable that the timeliness provisions of § 144 should apply to efforts to disqualify based on those circumstances. As indicated in the text, we do not here deal with an effort to disqualify, or with the timeliness thereof, but merely note the tendency to refer to § 144 in some of the cases dealing with § 455. *See, e.g., United States* v. *Conforte,* 624 F.2d 869, 879 (9th Cir.), *cert. denied,* 449 U.S. 1012 (1980).

contrary, he fully considered the motion and set forth his reasons for denying it.

Thus the question before us is neither the correctness nor incorrectness of Judge Zobel's determination of non-disqualification, nor the mere timeliness or untimeliness of Kodak's raising that question as support for its motion to vacate; the question before us, simply stated, is one of fundamental fairness. A motion to vacate an order of a Judge alleged to have violated § 455(b) necessarily occurs after the date of the alleged violation. There being no statute or rule limiting the time within which such motion may be filed, its filing cannot properly be described as either "timely" or "untimely." The passage of time is merely one factor and events preceding the motion require equal if not greater consideration. Thus the concept of "timeliness" merges into and is subsumed in the concepts of "equity", "fairness", and "justice." [10]

We recognize, as we must, that courts have spoken in terms of a "timeliness requirement" in cases like the present. Analysis reveals, however, that efforts to undo the work of judges allegedly disqualified have been deemed "untimely" for having been initiated at a wide variety of "times." *See, e.g., Kelley* v. *U.S.*, 712 F.2d 884, 887-88 (1st Cir. 1983) (three months after party learned of basis for disqualification); *In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980) (before judgment, but after seven and one-half years of pre-trial and trial effort);

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[10] There is no rule governing the time within which a motion may be brought to vacate an order issued by an allegedly disqualified judge, yet the major source of the Rules remains available and is applied here. "The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than the common law." Weinstein, *The Ghost of Process Past*, 54 Brooklyn L. Rev. 1, 4 (1988).

United States v. *Conforte*, 624 F.2d at 879 (learned facts pretrial, made motion post-trial).

The refusal of courts to "start over" has rested not on the mere passage of time, but on the events that had occurred and the balancing of equity/fairness considerations in deciding whether to expunge those events from history's pages. In deciding motions to vacate orders issued by an allegedly disqualified judge, the courts have used "untimely" as a synonym for "unfair" when the circumstances, like those present here, are such that a grant of the motion would produce a result inequitable, unjust, and unfair. "It is therefore appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would *otherwise* be unfair to deprive the prevailing party of its judgment." *Liljeberg*, 108 S. Ct. at 2206 (emphasis added).

For example, the First Circuit, whose decisions guide us here,[11] stated in *Kelley* that untimeliness was a sufficient reason to deny Kelley's motion based on reasons for disqualification Kelley had failed to mention for three months while prosecuting three other motions. In *In re United Shoe Machinery Corp.*, 276 F.2d 77, 79 (1st. Cir. 1960) the court said one knowing of a ground for disqualification "cannot be permitted to wait and decide he likes subsequent treatment that he receives" and that in preventing abuse "the requirement of timeliness is of fundamental impor-

[11] Because a motion to vacate based on an alleged disqualification of a trial judge is unrelated to patent law, we follow the guidance of the regional circuit in which the district court sits, here the First Circuit. *See Panduit Corp.* v. *All States Plastic Mfg. Co.*, 744 F.2d 1564, 1572-76, 223 USPQ 465, 469-72 (Fed. Cir. 1984); *Atari, Inc.* v. *JS&A Group, Inc.*, 747 F.2d 1422, 1438-40, 223 USPQ 1074, 1086-88 (Fed. Cir. 1984) (in banc).

tance." (Quoted by the district court in *United States* v. *Kelly*, 519 F. Supp. 1029, 1050 (D. Mass. 1981))[12]

The First Circuit is not alone among the circuits imposing a "timeliness requirement" in the 455(b) context. *See e.g. Ogala Sioux Tribe* v. *Homestake Min. Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *In re International Business Machines*, 618 F.2d at 932 (2d Cir.); *United States* v. *Conforte*, 624 F.2d at 879 (9th Cir.); *see also Chitimacha Tribe of Louisiana* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1164 n3 (5th Cir.), *cert. denied*, 464 U.S. 814 (1982); *but see e.g. United States* v. *Gipson*, 835 F.2d 1323, 1324 (10th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988); *United States* v. *Slay*, 714 F.2d 1093, 1094-95 (11th Cir.), *cert. denied*, 464 U.S. 1050 (1983). If it were necessary to speak of a "timeliness requirement," the circumstances of the present case form a far more compelling basis for imposing such a requirement than any appearing in the cited cases.

Because the conduct of the movant is a factor in the equity/fairness equation, Judge Mazzone noted that for six and one-half years, through trial, appeal, denial of certiorari, and several years of discovery on the damages phase, Kodak knew of Judge Zobel's position and remained silent. Obviously an objection by Kodak in 1981, and a mandamus petition if its objection were overruled, would have avoided any problem. *See* Fed. R. Civ. P. 46. Even after Judge Zobel announced in 1988 that she had become a legatee, that she was disqualifying herself, and that disqualification

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[12] There is no relation between Kelley and Kelly, or between the cited cases bearing those names in their captions. That the courts of the First Circuit consider a "timeliness" factor in criminal trials, when the delay in raising a disqualification question was a matter of months, further confirms the view that it would do so in this civil case, where the delay was six and one-half years.

was not waivable, Kodak objected to her disqualification and requested time to research a basis for that objection. Presuming, mistakenly, that those considerations meant that its motion had been denied only as "untimely", Kodak relies on the obvious and irrelevant in asserting "there is no timeliness requirement under § 455(b)."

Arguing for an immortal disqualification,[13] Kodak would have us disregard all that has happened during the six and one-half ensuing years and all that Judge Mazzone had to say about Kodak's acquiescence, aging of witnesses, fading of memories, and the unfairness of vacating Judge Zobel's orders and requiring Polaroid to start all over. Kodak fails to note a distinction in the fairness quotient of prospective and retrospective remedies. *See Health Services Acquisition Corp.* v. *Liljeberg,* 796 F.2d 796, 801 (5th Cir. 1986, *aff'd,* 108 S. Ct. 2194 (1988); *In re Cement and Concrete Litigation,* 515 F. Supp. 1076 (D. Ariz. 1981) (acknowledging difference between prospective disqualification and vacating past actions), *mandamus denied,* 688 F.2d 1297 (9th Cir. 1982), *aff'd for lack of a quorum,* 108 S. Ct. 2194 (1988). The district court's opinion was cited with approval in *Liljeberg,* 108 S. Ct. at 2203 n.9.

Thus assuming, solely for the purposes of this opinion, that Judge Zobel should have disqualified herself in 1981, the Supreme Court has provided the test to be applied, stating in *Liljeberg,* 108 S. Ct. at 2203:

> Although § 455 defines the circumstances that mandate disqualification of federal judges, it neither

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[13] Contrary to Kodak's arguments, Congress did not intend that a violation of § 455 should in itself and automatically deprive the judge of jurisdiction. "Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation." *Liljeberg,* 108 S. Ct. at 2203.

> prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.
>
> . . . We conclude that in determining whether a judgment ~~should~~ be vacated for a violation of § 455, it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Applying the Court's guidance in *Liljeberg* to the facts of this case, the risk of injustice to the parties weighs far more heavily on Polaroid's side of the scales; there is little or no risk of injustice in other cases, the present denial resting on the specific facts of this case; and the public's confidence in the judicial process is less likely to be undermined when its result is adhered to in repose, and would be more likely to be undermined if the law were to countenance a sundering of the result six and one-half years later on grounds other than the merits.[14]

Kodak argues that *Liljeberg* dealt with § 455(a), not 455(b). The argument is meritless, the Supreme Court having made no such distinction in outlining the test to be used in deciding whether to vacate "for violation of § 455." Though the First Circuit has not had occasion to speak

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[14] In *Liljeberg*, the movant first learned of a basis for disqualification ten months after the appeal had been decided, and moved immediately to vacate the judgment under Rule 60(b)(6), which may be contrasted with the conduct of the present movant who was told the facts by the district court at the outset of trial and moved to vacate after six and one-half years of silence and the conduct of the full judicial process.

of the differences between sections 455(a) and 455(b), we are confident it would find persuasive, as would we, the Eleventh Circuit's discussion in *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), in which the court applied *Liljeberg* to 455(b) in the very context involved here. After concluding that differences between sections 455(a) and 455(b) did not "preclude the application of harmless error analysis in the context of a 455(b) violation," [15] the court said:

> We believe that this conclusion is supported by the Supreme Court's *Liljeberg* decision. When the Supreme Court outlined the test for determining whether a judgment should be vacated due to a § 455 violation the Court did not draw any distinctions between § 455(a) and § 455(b). Further, in the sentence immediately preceding its test to be used when evaluating the appropriate remedy for a § 455 violation the Court stated: "Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for *all* § 455 violations."

Id. at 1527-28 (citations omitted) (emphasis in original).

Kodak's argument that *Liljeberg* applies only to motions to vacate final judgments under Fed. R. Civ. P. 60(b)(6) is equally meritless. As recognized in *Parker*, the Court was speaking of the appropriate remedy for a section 455 violation. The governing principles of equity and fairness are not affected by the label attached to that sought to be vacated. *See In re International Business Machines*, 618 F.2d at 932-34 (denied motion made before judgment on merits).

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[15] *See* Fed. R. Civ. P. 61.

CONCLUSION

No basis exists in law, equity or fairness for giving Kodak an additional bite at the apple. It availed itself fully of the judicial process through a fair and complete trial and a full consideration of its arguments on appeal and in its petition for certiorari. It failed to establish invalidity of Polaroid's patents and was found to have infringed those patents. In light of the factors enunciated in *Liljeberg* and the particular facts of this case listed by Judge Mazzone, we agree with his refusal to "find that it is the law that Eastman Kodak obtains a vacation of this case up to this point" and with his view that a grant of Kodak's motion would not produce a "sensible and fair outcome of this case." Accordingly, the denial of Kodak's motion is affirmed.

AFFIRMED.

APPENDIX B

Ruling of the District Court on Disqualification, October 5, 1981

UNITED STATES OF AMERICA

DISTRICT OF MASSACHUSETTS

CA 76-1634-Z ZOBEL, D. J.

POLAROID CORPORATION

v.

EASTMAN KODAK COMPANY

FIRST DAY OF TRIAL

APPEARANCES:

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Francis T. Carr, Esquire
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Attorneys for the Defendant

Courtroom No. 3
Federal Building
Boston, Massachusetts

October 5, 1981

The Clerk: Polaroid Corporation versus Eastman Kodak Company, Civil Action 76-1634-Z.

B2

Ruling on Disqualification

Mr. Frank: Good morning, your Honor. I would like to introduce and move for the purposes of this case the admission for several of the lawyers from the Kodak team who are sitting in the jury box.

(Whereupon various counsel were introduced sitting behind the bar.)

The Court: Well, they will be admitted. I assume you're going to file the necessary affidavits under the rules.

Mr. Kerr, do you have a similar motion?

Mr. Kerr: Your Honor, I don't have my complete cast of counsel here with me this morning.

So that I can't introduce counsel to you, to the Court this morning. With me at counsel table this morning is my partner, Herbert F. Schwartz, whom you met in the past; my associates, Ronald K. Fierstein and Patricia A. Martone. You will have additional counsel as the case proceeds.

The Court: Mr. Carr, and Mr. Frank, could I please have the names of the two people at counsel table.

(Counsel at defendant's table introduced.)

Before we begin, I should tell you that I have a mother-in-law problem. It is not the sort that Ann Landers would be interested in. But I learned yesterday that my mother-in-law owns a thousand shares of Kodak stock. She has been a stockholder of Kodak for some 50 years. I do not regard this as disqualifying and at this point will proceed to hear the case.

We were going to begin with impressionistic openings and I will hear Mr. Kerr.

* * *

APPENDIX C

Memorandum of Recusal of the District Court, June 21, 1988

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 76-1634-Z

POLAROID CORPORATION

vs.

EASTMAN KODAK COMPANY

MEMORANDUM

ZOBEL, *D.J.*

This action was filed on April 26, 1976, and assigned to me on March 17, 1980. Trial of the issues of liability was scheduled to begin on October 5, 1981.

The evening of October 4, 1981, the Court learned that her mother-in-law owned one-thousand shares of Eastman Kodak Company stock. The Court so informed all parties before opening statements and the taking of any evidence. Kodak did not then object to the Court's participation. Throughout the seventy-five days of trial, Kodak's silence continued. On September 13, 1985, the Court ruled on the validity and infringement of the nine Polaroid patents in suit. Kodak still remained mute.

On October 11, 1985, the Court enjoined Kodak from infringing seven of Polaroid's patents and denied a stay of the injunction pending appeal. Kodak said nothing about disqualification.

A lengthy appellate process followed: an application to the Court of Appeals for the Federal Circuit for relief from

the denial of a stay; a petition to the United States Supreme Court; an appeal from the judgment; and a petition to the Supreme Court for a *writ of certiorari*, which was denied on October 6, 1986.

At no point did Kodak call the higher courts' attention [to] the possible need for disqualification.

During ten pretrial conferences over twenty-six months with this Court concerning the damages trial, Kodak's silence remained unbroken.

On May 9, 1988, the Court informed counsel that her mother-in-law had died and that the estate included Kodak stock. The Court also explained to counsel that her husband was named executor, and that he was the residuary, and she [is] a specific legatee. The Court announced that she could not continue to preside over the case and would *sua sponte* recuse herself. Counsel for both parties immediately said they would waive any objections to her continued participation. The Court responded that disqualification was mandatory and not waivable. Counsel expressed a desire to have some time for research. The Court, while explicit in her belief that the hunt would be fruitless, acquiesced. To date, neither party has submitted any authority even suggesting the incorrectness of the Court's stated position. Indeed, for the first time since October 5, 1981, Kodak asks [for] recusal.

Because, as a result of my mother-in-law's death, I have a "financial interest in . . . a party to the proceeding. . . ." within the meaning of 28 U.S.C. § 455, I hereby recuse myself *nunc pro tunc* May 9, 1988. The case shall be drawn to another judge in accordance with the normal practice of the Court.

Date: June 21, 1988

RYA W. ZOBEL
District Judge

APPENDIX D

Order and Oral Opinion of the District Court Denying Motion to Vacate Prior Orders, August 11, 1988

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 76-1634-Z

POLAROID CORPORATION,

Plaintiff,

v.

EASTMAN KODAK COMPANY,

Defendant.

MOTION OF DEFENDANT EASTMAN KODAK COMPANY PURSUANT TO 28 U.S.C. § 455

Defendant Eastman Kodak Company hereby moves pursuant to 28 U.S.C. § 455 for entry of an order (a) recusing the Honorable Rya W. Zobel from further presiding over this action and (b) vacating all orders entered by Judge Zobel in this action from October 4, 1981 to date, including her decision of September 13, 1985, holding certain of Polaroid Corporation's patents valid and infringed by Kodak and her order of October 11, 1985, enjoining Kodak from infringing the Polaroid patents held valid by the September order.

DENIED, for reasons stated at hearing.

A. DAVID MAZZONE
U.S.D.J.
8/11/88

D2

Order and Oral Opinion Denying Motion to Vacate Prior Orders

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 76-1634-MA

POLAROID CORPORATION,

Plaintiff,

vs.

EASTMAN KODAK CO.,

Defendant.

BEFORE:

Honorable A. David Mazzone
United States District Judge

MOTION HEARING

APPEARANCES:

William Cheeseman, Esq., Foley, Hoag & Eliot, One Post Office Square, Boston, Massachusetts 02109, for Polaroid.

Herbert F. Schwartz, Esq., Robert J. Goldman, Kenneth B. Herman, Fish & Neave, 875 Third Avenue, New York New York, for Polaroid.

Robert S. Frank, Jr., Esq., Choate, Hall & Stewart, Exchange Place, 53 State Street, Boston, Massachusetts, for Eastman Kodak.

Richard E. Carlton, Esq., Richard H. Klapper, Esq., James E. Akers, Esq., Sullivan & Cromwell, 125 Broad Street, New York, New York, for Eastman Kodak.

* Corrected for transcription errors by agreement of the parties.

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Order and Oral Opinion Denying Motion to Vacate Prior Orders

Laura Kay Shean Walker, Federal Court Reporter
USPO & Courthouse, Boston, Massachusetts

Courtroom 5
August 11, 1988
Federal Courthouse
Boston, Massachusetts
3:30

Computer-aided transcription

* * *

The Court: I'm going to rule on it, because I've given it, over the past month, a lot of thought, and I've read the record I described. I did spend a particularly large amount of time with the decision of Judge Zobel and the Federal Circuit decision. I had two reactions actually. I marveled at the work my esteemed colleague did. And I was immensely gratified that she came to the Court when she did, because, as you know, it was my case before she drew it at random from me.

In furtherance of her position, I looked—I am not sure what I was looking for, counsel. I suppose I was looking for something to step out and hit me in the face as to some clear way that this case here could be managed from this point on. And I could see nothing in that comprehensive, tight decision from Judge Zobel, and what I thought was the affirmance on all scores in the Federal Circuit.

So, we start with the back drop that on October 5th, 1981, Mr. Carlton, the first day of the liability trial, Mr. Frank was there. Judge Zobel told Eastman Kodak that her mother-in-law owned a thousand shares of Eastman Kodak stock, and she said further she did not regard that as disqualifying and proceeded to hear the case. So it's clear that all parties knew before the trial started, and throughout the trial, on and after her ruling in October

1985, on and after 1985 and 1986 to the appellate procedure that her mother-in-law owned that stock. Now, that's all that was said at that time. I don't think also that there is any reasonable dispute over the holding, over the requirement of Section 455 that the judge disqualify herself if she has an interest—and it is defined later—that could be substantially affected by the outcome of the proceedings.

Now, I understand the arguments of both sides, and I looked, and do look, to the latest teaching of the Supreme Court which is *Liljeberg* v. *Health Services Acquisition Corporation.*

Now, Eastman Kodak tells us that disqualification was mandatory. That's no longer in issue because Judge Zobel has disqualified herself *sua sponte,* after being told, incidentally, by counsel that both sides would acquiesce to her continuing to sit on the case. And Eastman Kodak tells me further that there's nothing but vacation of every order that she issued that is possible in this case, because her actions essentially were a nullity after October 1981.

The Polaroid position—predictable—says that Rule 60(b) applies. The 54(b) judgment is the final judgment under the circumstances in which it is issued here, and relief is not available under 60(b) for any reason. The questions *Liljeberg* tells us we should ask are: Would a reasonable or an objective observer have questioned Judge Zobel's impartiality, because it's clear that if there were an interest, as I said earlier, that could be substantially affected by the outcome of the proceedings, disqualification is mandatory. So, would an objective observer have questioned Judge Zobel's impartiality on October 4th, 1981? That question is put to us in light of the Supreme Court's opinion, as they said in *Liljeberg.*

Order and Oral Opinion Denying Motion to Vacate Prior Orders

There is also a second part of that section of the opinion, and that is what the Court says. There is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a Draconian remedy for every violation of Section 455.

So, under those circumstances, I think it appropriate before we answer the first question to consider the circumstances under which this situation arose. Again citing *Liljeberg,* [i]s it appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief would produce injustice in other cases and the risk of undermining the public's confidence in the judicial process. So, they go on, [i]t is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question the judge's impartiality.

They went on to outline four specific questions. The answers to which they then conclude that the violation in that case was neither insubstantial or excusable. So against that teaching, what we have here—it seems to me—is the following: From the Schwartz affidavit and from the record, we know this. Judge Zobel told everybody that her mother-in-law owned this stock on October 4th or 5th, 1981 before the trial started. Kodak neither questioned nor called her attention to any feelings it might have had that her continued presence in the case would be a violation of Section 455.

When the case went to trial, it lasted—I'm told—something like 75, 80 days of testimony. And afterward it concluded, the Court took it under advisement for several years, 1981 to 1985 when the Court's ruling came down after a period of, I guess, four years. During that time, Kodak did not venture a suggestion, did not move for disqualification throughout the appellate process. There was

no suggestion again, especially to the Federal Circuit which the Statute 1295 says, [s]hall have exclusive jurisdiction, the Circuit Court of Appeals for the Federal Circuit, shall have exclusive jurisdiction of an appeal from a final decision of the District Court of the United States, et cetera. It certainly was a forum in which this belated concern could have been raised.

I understand, again from the docket, that since Polaroid has submitted its damage demand, there have been 10 or 12 conferences for the purpose of trying to establish a schedule for the damages trial and throughout that period again Kodak did not say anything until on May 9th when Judge Zobel's mother died—her mother had died earlier than that, but she informed counsel that her mother-in-law had died—and she was then a beneficiary of the estate, and could no longer sit *sua sponte*. Even then I think the record is clear that Mr. Carlton consistently asked or indicated that Eastman Kodak would voluntarily, or waive objections to her continuing in the case. And until I received these papers here, there was never any objection or suggestion by Eastman Kodak to Judge Zobel's presiding over the case up until that point, or that in any way her earlier orders were affected by her ruling.

So, we have here circumstances where a trial judge has spent six and a half years on the case, aware of the fact that her mother-in-law, not her, owned a thousand shares of Eastman Kodak (sic), and whether or not that was such a substantial interest that it required her disqualification in 1981. First, under the objective test, I do not believe she was incorrect. While she was in a position to determine the case in favor of either, or she was able to determine the case in such a way that stockholders would have been affected, stockholders in either company would have been

affected, she said that she did not believe that to be so, and she said so. Perhaps it was the amount of stock which is insubstantial and insignificant in amount in comparison to the outstanding stock, or the uncertainty of the outcome based on the reasonable fact she did not feel that disqualification was necessary.

The case was uncertain. It was a terribly complex case. The parties had spent three years or so preparing it. She was familiar with it. The shares were a minor, insignificant amount. The outcome was uncertain. And she said she did not believe, and she stated so, that this was not a disqualifying reason. And I don't think that was incorrect.

I think Eastman Kodak agreed with her, and so indicated by its failure to take any action to correct her or even to correct her misapprehension as to whether or not it was a substantial interest. If they had so requested, findings would have been made. The record is clear. But under these circumstances, I cannot find that it is the law that Eastman Kodak obtains a vacation of this case up to this point. I do not think that would be fair, nor do I think it would be equitable to everyone. It simply gives Eastman Kodak another trial and that would not be, in my judgment, the sensible and fair outcome of this case.

For six and a half years Eastman Kodak has known Judge Zobel's position. Witnesses have aged; memories have faded. Liability was tried in a long complex exhausting effort by all parties. It was appealed; it was affirmed. Years and years have gone by. A modest amount of Eastman Kodak's revenues are involved, I'm informed in the Schwartz affidavit, and I have nothing to contravert that.

So, for reasons that, one, I believe Rule 60(b) applies, and Eastman Kodak is barred from its obtaining a vacation of these orders, and under 455 as well. Under these cir-

cumstances, it would be Draconian and unjust, extraordinary to require a second trial. So, my ruling is that the motion is denied.

Now, counsel, I will certify the matter immediately, if you want me to, by adding to my order, "with permission to appeal." I don't want the matter to sit around, because I'm going to have to sit with you and arrange a schedule. I don't know if you've been promised a trial date, but I'm prepared to follow what your schedule is as far as the trial is concerned. But I'm not going to get involved in that in meeting with you if you want this matter cleared up by a higher court. So if you want me to, I will certify the matter immediately to the Federal Circuit.

Mr. Carlton: [Counsel for Eastman Kodak Company] Your Honor, we would respectfully request that you so certify it.

The Court: All right. Then I believe in certifying, that this question involves a controlling question of law as to which there is a substantial difference of opinion. Am I right so far? And that an immediate appeal would materially affect the ultimate termination of the litigation. I certify it under 1292(c) to the Federal Circuit Court of Appeals.

All right. That will be my order.

(Recess taken.)

CERTIFICATE

I, Laura Kay Shean Walker, Registered Professional Reporter, do hereby certify that the foregoing transcript, is a true and accurate transcription of my stenographic notes.

LAURA KAY SHEAN WALKER

APPENDIX E

Judgment of the Court of Appeals, February 17, 1989

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

88-1616

POLAROID CORPORATION,

Plaintiff-Appellee,

v.

EASTMAN KODAK COMPANY,

Defendant-Appellant.

JUDGMENT

ON APPEAL from the United States District Court for the District of Massachusetts in CASE NO(S). 76-1634.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

DATED FEB 17 1989

COSTS: Against, Defendant-Appellant.

PRINTING $439.68

TOTAL $439.68

ISSUED AS A MANDATE: March 10, 1989

ENTERED BY ORDER OF THE COURT
Francis X. Gindhart, *Clerk*

APPENDIX F

28 U.S.C. § 455

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a

"financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a manual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.